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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

Study of the issue of the privatization of prisons

Working paper submitted by Mr. Miguel Alfonso Martínez

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INTRODUCTION

1. The issue of the privatization of prisons was brought to the attention of the Sub-Commission's Working Group on Detention for the first time during its 1988 session. 1/ Due to the Group's full agenda, only a brief preliminary discussion of this question could take place that year. 2/ Despite this limitation on debate, many participants expressed the view that in future sessions the Working Group should address it on the basis of a working document to be prepared on the subject. The Group requested Mr. M. Alfonso Martínez to draft such a document for the 1989 session. 3/

2. Mr. Alfonso Martínez consequently held conversations on this issue with several non-governmental organizations active in the field of the promotion and protection of the rights of all persons subjected to the various forms of imprisonment or detention and which were present at the early exchange held at the Working Group (i.e. the International Commission of Jurists, Amnesty International and Defence for Children International). Following these consultations, Mr. Alfonso Martínez considered that it would be premature to submit such a document without having benefited from at least a more thorough debate within the Working Group which could make it possible for the Sub-Commission to provide more precise guidelines as to the possible content and ultimate purpose of the document requested.

3. The lively and enlightening debate which followed his opening remarks on this issue at the Working Group's 1989 session (in which he explained his reasons for not submitting any formal document on that occasion), proved the usefulness of such a cautious approach. All members of the Working Group gave their opinions on the subject and several other Sub-Commission members also contributed to the richness of the debate. The statements made by several NGOs (particularly the International Commission of Jurists) offered additional evidence of the well-known potential of these organizations for identifying technical aspects of particularly complex issues such as the one under consideration. 4/

4. On 28 August 1989, the Working Group decided to recommend to the Sub-Commission that Mr. Alfonso Martínez should be requested to prepare a document "... containing proposals on the best way to approach the study on the privatization of prisons". 5/ Acting upon this recommendation, the Sub-Commission adopted decision 1989/110 of 1 September 1989 entitled "Study of the issue of privatization of prisons", in which it requested Mr. Alfonso Martínez to "... prepare, without financial implications, a working paper which would contain proposals on the best way for the Sub-Commission to study further the issue of privatization of prisons". It also requested Mr. Alfonso Martínez to submit his working paper for consideration at its forty-second (1990) session under the agenda item "The administration of justice and the human rights of detainees".

5. Partly because of his academic duties and also because of the time he dedicated to the advancement of another issue to which the Working Group had assigned a higher priority (i.e. the completion of the drafting of the

declaration on the protection of all persons from enforced or involuntary disappearances), it was not possible for Mr. Alfonso Martínez to complete the document requested in time to be discussed by the Sub-Commission at its forty-second session as requested in decision 1989/110.

6. In light of the above, the Working Group decided at its 1990 session to postpone the consideration of this issue until 1991. 6/

7. The present working paper has been prepared for submission to the Sub-Commission pursuant to decision 1989/110. It is also being submitted, for preliminary consideration, to the Working Group on Detention at its 1991 session.

THE ISSUES

8. During the last decade, human rights advocates, sociologists, jurists and the public in general have witnessed the recurrence of a socio-economic phenomenon - the operating of prisons as profit-making enterprises - which most of them had considered to have long ago been superseded by societal development. The management of prisons as a vehicle for profit, a regular practice during the nineteenth century in many industrialized countries, led to such intense labour exploitation, scandals and abuses that the State was forced to assume exclusive administration of the prisons.

9. Obviously, the present trend is not merely a reversion to nineteenth century conditions. History cannot simply repeat itself in this sphere. However, the issues related to both its alleged advantages and disadvantages have prompted serious debate and concerns. The subject has motivated a number of Governments to commission studies designed to examine the pros and cons of the eventual privatization of their penal facilities and to encourage inquiries from private corporations interested in assuming these kinds of functions. Specialized literature on the subject abounds. Academic journals have dedicated special issues to the privatization of prisons and special conferences have been held to examine several aspects of the privatization of penal punishment. The debate will surely continue for years to come.

10. At present, of course, private entrepreneurs continue to provide a variety of services to penal institutions (for example health care and catering, fields in which they have traditionally been active). However, they are now taking advantage of the upsurge in several developed market-economy countries of certain political/economic theories that praise the "overwhelming advantages" of private investors' initiatives over government action to widen their areas of activity. These theories, in reality, are merely modern adaptations of concepts and policies that bloomed in the early stages of the development of market economies. They appeal to those, in both developed and developing countries, who see current governmental practices as being responsible for creating and incapable of resolving the problems. An increasingly dire situation, reflected in rising crime rates, prison overcrowding, a shortage of qualified correctional personnel, a lack of adequate prison facilities and a general dearth of financial resources, often is a result of national/international economic conditions, bureaucratic mismanagement and corruption.

11. It must be stressed at this point that present-day private capital participation in this particular aspect of the administration of justice is not limited to the direct management of a growing number of penal institutions, the most controversial manifestation of prison-for-profit ventures. The areas of private entrepreneurial interest now also include: (a) private financing for prison construction; (b) the private operation of penal industries (c) correctional facility management; and (d) the combined financing, design, construction and operation of entire correctional facilities.

12. Of these four areas, the preferred form of privatization remains (a) the financing of prison construction, which often involves the private firm, as the landlord, leasing out its facility to the correctional agency, the tenant. Areas (c) and (d) are controversial, simply because the responsibilities inherent in the daily administration of a correctional facility vests private persons with an extraordinary amount of power and control over the lives of the inmates. Examples of this responsibility have been shown to include: supervision and eventual repression of the institutionalized person; procedures concerning prisoners' access to food, clothing and shelter; decisions regarding prisoner access to hygienic, medical, educational, rehabilitative and recreational services; control of prisoners' receipt of correspondence, information and visitors; control over the practice of religion; as well as the evaluation of prisoners' conduct, including rewards and punishments, such as the accumulation of good-conduct time and eligibility for parole.

13. Four key reasons have been advanced in support of the privatization of prisons: (a) it is a means of reducing the problems that attend the confinement of prisoners in facilities that are increasingly overcrowded; (b) it increases the flexibility of an overly rigid correctional system; (c) it keeps down the costs of correction; and (d) it will still achieve the conventionally accepted goals of punishment.

14. Institutional overcrowding is a reality in many countries. This generally results from a combination of tougher attitudes towards offenders (including longer sentences) and lack of resources to build the necessary facilities. It is claimed that the activity of the private sector is capable of reducing management and legal problems related to overcrowded conditions of imprisonment. A corollary to that would be that incidents related to those conditions would also diminish.

15. Those who oppose this notion point out that there is no proof that private initiative can directly influence the causes of overcrowding of penal institutions (e.g. it cannot directly influence sentencing policies and practices), and that it has done little or nothing to bring about solutions to overcrowding in some of the fields in which it is possible for corporations to act (e.g. promoting programmes that would allow inmates to reduce the length of their stay in custody, or providing alternatives to imprisonment). They also argue that the major interest of private entrepreneurs with respect to overcrowding is apparently in the financing, building and eventual operation of penal facilities, considered to be a field of operations more profitable than others.

16. Advocates of privatization claim that entrusting private initiative with certain correctional tasks would liberate the latter from "insensitive and inflexible centralized bureaucracy" and would bring about an increased flexibility and capacity on the part of the penal system in facing changes that require rapid decisions, e.g. adapting to a marked increase/decrease in the number of institutionalized individuals. This, they maintain, would also produce a more responsive and efficient system of punishment. Opponents of privatization state that this is such a complicated issue that effective mechanisms to monitor developments in advance and plan possible responses to such changes are very few or non-existent.

17. Restraining correctional costs is a most appealing argument to many countries, both developed and developing. Private consortia engaged in prison-for-profit activities assert that not only can they offer construction at less than conventional cost, but they can also offer protection against soaring interest rates and increasing construction costs by means of more flexible financing arrangements. Against this, it has been argued that, in many cases, the original projected costs submitted by private interests often increase substantially prior to completion and that, at any rate, no solid proof of the greater cost-effectiveness of private sector endeavours in this field has been produced.

18. Sectors interested in privately managed incarceration underscore the apparent inability of Governments to fulfil the conventional goals which have been the main aim of the correctional system since the last century, i.e. to effect substantial or sustained reform in the character or behaviour of convicted offenders (rehabilitation). They have also pointed out that high rates of recidivism occur in many countries. The rejoinder of those who oppose privatization is that there has likewise been no proof of the ability of privately run facilities to achieve the same goals.

19. In addition to all the arguments advanced by the opponents of privatization, the most serious challenge to the proposition derives from the notion that Governments may relinquish a fundamental aspect of their jurisdiction, i.e. the management and supervision of their penal system, by contracting it out to private corporations. The power to punish antisocial conduct is by definition of a public nature; thus, a _prima facie_ contradiction exists between that very nature and the possibility of ceding such a function to institutions whose sole _raison d'être_ is the profitabilty of their endeavours.

20. Even assuming that private management of prisons is more cost-effective than government-operated endeavours, it has been stressed that fiscal efficiency cannot be the sole concern of correction. Other considerations having to do with practical constitutional and other legal issues, as well as with those inherent in the delegation of that authority, its impact on the lives and rights of the institutionalized individuals, and the accountability for breaches thereof, must have a higher value.

21. To concede that private enterprise might have a productive role in certain limited areas of the prison system is entirely different from actually granting a private enterprise the possibility of using the basic element of imprisonment, which is coercion. The fact that the opinions of the management

of private penal institutions could influence the decisions of bodies such as parole boards concerning whether or not an inmate should be released seems to be in total contradiction to the public nature of all aspects of the administration of justice.

22. The possibility of using deadly force in the guardian-inmate relationship poses innumerable ethical and juridical questions, as does the question of the recognition of authority by the individuals institutionalized in private penal facilities. The danger that cost-conscious enterprises might lower the standards required of an individual with responsibilities of guardianship, control and eventual repression is not a merely academic one.

23. Yet another important issue to be examined is the degree to which an individual whose human rights have been breached in a privately run institution can obtain adequate redress from the corporation. There are many examples in the specialized literature pointing out that in several cases, redress has been possible only after protracted litigation which usually requires significant financial resources to pursue.

CONCLUSIONS AND RECOMMENDATIONS

24. From the above, it is evident that the issues inherent in the general proposition of privatization of prisons are numerous, complex, controversial and not fully explored from the conceptual point of view. Many of them give rise to several questions of great significance for the overall "philosophy" of certain fundamental aspects of societal responsibility and institutional life. Moreover, and from the point of view of the work of the Sub-Commission, the practical solutions that may be given to all those questions could have far-reaching implications for the effective implementation of human rights and fundamental freedoms in the daily life of a substantial number of individuals in all societies, i.e. their penal populations.

25. In recent years the number of institutionalized persons subjected to either detention or imprisonment in various types of penal facilities is on the rise in a significant number of countries all over the world. This fact compounds the need to pay increased attention to all possible factors that might affect - positively or negatively - the basic rights and freedoms of persons deprived of their liberty.

26. The debate on the issues related to the privatization of prisons is far from having been exhausted within the Sub-Commission. It is true that although a most fruitful, seminal debate took place in the Working Group in 1989, there has never been a discussion on the subject in the plenary of the Sub-Commission. The first conclusion of this working paper is therefore that the question of the privatization of prisons deserves further debate in this specialized body of the United Nations system. A fresh opportunity should be given to all interested members of the Sub-Commission, and to delegations of observer Governments, intergovernmental and non-governmental organizations, to advance their views on this subject in the light of recent information and of any results that may exist of the experiences related to private prisons.

27. The Sub-Commission will certainly benefit from an updated review of this matter by the Working Group on Detention at its 1991 session. There are reasons to believe that the latter's membership will, to a certain extent, be different from what it was in 1989, when the only substantive debate on this issue took place. There is no reason for the Working Group to limit itself to discussion of the conclusions and specific recommendations for future work included in the present working paper. A debate on the substantive issues involved should be encouraged on that occasion.

28. Nevertheless, for practical reasons, the plenary of the Sub-Commission, under the item "The administration of justice and the human rights of detainees", is the proper forum for the thorough, substantive debate required to shed more light on all the issues related to the proposition of private incarceration.

29. Taking into account the complexity of the subject and the fact that it will be considered - together with other matters - under an agenda item which, as a rule, is taken up in plenary at the end of the session, it seems highly improbable that such a debate can take place in 1991 during its forty-third session. None the less, the Sub-Commission may consider it useful to decide at its present session to establish the basis for an in-depth review of all aspects of this matter in 1992, during its forty-fourth session.

30. Consequently, and as the next step in its further consideration of this subject, it is recommended that the Sub-Commission decide at its present (forty-third) session:

(a) To consider the question of privatization of prisons at its forty-fourth (1992) session under item 10 (a) of its provisional agenda;

(b) To request Governments, intergovernmental and non-governmental organizations to submit their views on this matter to the Secretary-General, if possible not later than 15 April 1992; and

(c) To request the Secretary-General to submit to the Sub-Commission at its forty-fourth session a document in which said responses are to be compiled and presented in a systematic order with analytical comments.

31. After such elements are provided, the Sub-Commission will be in a position to benefit fully from a much-needed, ample and profound debate on all issues related to this subject. Following such a debate, the Sub-Commission may wish to decide, at its forty-fourth (1992) session, on its future course of action on this matter. This should be aimed at reaching conclusions and recommendations on whether or not the privatization of prisons: (a) is an adequate solution for present-day problems faced by many States in connection with this specific aspect of the administration of justice; (b) provides adequate guarantees for ensuring the effective protection of the human rights of all persons subjected to any form of detention or imprisonment; and (c) constitutes a suitable tool for achieving the key correctional, educational and rehabilitative purposes inherent in the administration of justice in any given society.

32. Three options will be open for the Sub-Commission in carrying out its future work on this matter:

(a) To instruct its Working Group on Detention to study this subject further and to submit conclusions and recommendations on: (i) the possible advantages and disadvantages of the privatization of prisons based on a thorough review of the various issues related to the proposition of privately managed incarceration; and (ii) specific standards to be observed in the operation of existing penal institutions under private management;

(b) To establish an in-session working group with a mandate similar to the one described in (a) above; or

(c) To recommend to its parent bodies the appointment of one of its members as Special Rapporteur with the mandate to undertake a special study on the question of the privatization of prisons.

33. Of the three options, the appointment of a Special Rapporteur seems to be the most suitable. On the one hand, the importance and complexity of the issues related to this matter are considerable and require the thorough dedication, time, availability and continuity of effort that only a Special Rapporteur can provide. It is to be noted that, for those same reasons, this new study should preferably be undertaken by a member of the Sub-Commission who is not engaged in carrying out another special study. On the other hand, this new task will further complicate the work of the Working Group on Detention, already overburdened by a full agenda to be covered in the limited number of meetings that all in-session working groups can hold every year.

34. As far as the element of time is concerned, the advantages of the establishment of a new in-session working group exclusively for this purpose are obvious. However, it is clear that, with three other in-session working groups already established and functioning for the foreseeable future, the possibility for Sub-Commission members to participate regularly in this new one would be greatly reduced. The added constraints that its establishment would create for the functioning of plenary meetings of the Sub-Commission must also be taken into account.

Notes

1/ See document E/CN.4/Sub.2/1988/28, para. 10.

2/ Ibid., paras. 47-51.

3/ Ibid., para. 52.

4/ For details on this debate, see document E/CN.4/Sub.2/1989/29, paras. 32-39.

5/ Ibid., para. 40.

6/ See document E/CN.4/Sub.2/1990/32, para. 32.